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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 510

LEONARD J. SACHS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Fifth Circuit.**

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## PETITION FOR A WRIT OF CERTIORARI
**To the United States Court of Appeals for the Fifth Circuit.**

Leonard J. Sachs, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 24, 1961.

### OPINIONS BELOW.

The opinion of the District Court, in reality an order overruling petitioner's motion to dismiss (R. Vol. I, p. 10), has not been reported. A copy is appended as Appendix I.

The opinion of the Court of Appeals (R. Vol. II, p. 414) has not been reported. A copy is appended as Appendix II.

## JURISDICTION.

The judgment of the Court of Appeals was entered August 24, 1961. A petition for rehearing was denied on September 22, 1961 (R. Vol. II, p. 419).

Jurisdiction to issue the writ is invoked pursuant to the provisions of Title 28, Section 1254 (1), United States Code.

## QUESTIONS PRESENTED.

I. Whether Small Business Administration is a department or agency of the United States within the purview of Section 1001, Title 18, United States Code, so that prosecutions may be laid thereunder predicated upon statements allegedly made to Small Business Administration with knowledge that same are false.

II. Whether prosecution will lie under Title 18, Section 1001, United States Code, for submission of a financial statement containing allegedly false information to a Government agency in order to secure a contract for production of goods after the goods have in fact been produced, accepted, and paid for by the particular Government agency.

III. Whether, in its opinion disposing of petitioner's appeal, the Fifth Circuit Court of Appeals committed prejudicial error in failing to consider and pass upon all of the assignments therein made.

## STATUTES INVOLVED.

The chief statute involved is **Section 1001, Title 18, United States Code,** which provides

"**Section 1001.** Statements or entries generally

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749."

Other statutes involved, however, are **Sections 633 (a), 638 (a) and 645 (a), Title 15, United States Code,** providing:

**Section 633 (a).**

"In order to carry out the policies of this chapter there is created an agency under the name 'Small Business Administration' (herein referred to as the Administration), which Administration shall be under the general direction and supervision of the President and shall not be affiliated with or be within any other agency or department of the Federal Government."

* * * * * * *

**Section 638 (a).**

"Whoever makes any statement knowing it to be false, . . . for the purpose of influencing in any way the action of the Administration, . . . under this chapter, shall be punished by a fine of not more than

$5,000 or by imprisonment for not more than two years, or both."

* * * * * * *

**Section 645 (a).**

"Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of obtaining for himself or for any applicant any loan, or extension thereof by renewal, deferment of action, or otherwise, or the acceptance, release or substitution of security therefor, or for the purpose of influencing in any way the action of the Administration, or for the purpose of obtaining money, property, or anything of value, under this chapter, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both."

## STATEMENT OF THE CASE.

Petitioner, along with William Sachs, was indicted in the Northern District of Georgia under an indictment in two counts, each charging violation of Title 18, Section 1001, United States Code, the first count being laid with respect to the Air Material Command, United States Air Force, and the second count with respect to Small Business Administration.

Somewhat by way of preamble, count one alleged (R. Vol. I, p. 2) four Georgia corporations, all having a place of business in Atlanta, Fulton County, Georgia, designated in the indictment as "corporations" were:

| Name | Date Organized |
|---|---|
| Fulton Trouser Company, Inc. | February 3, 1948 |
| Henry Garment Company | March 6, 1952 |
| Will Manufacturing Company | June 25, 1953 |
| Federal Sportswear, Inc. | July 10, 1953 |

appellant being President and a Director of Fulton Trouser and Henry Garment Company and William Sachs being the Secretary-Treasurer and a Director thereof.

That on or about March 27, 1954, defendants, for the purpose of obtaining a contract from the Air Material Command, United States Air Force, made and used a balance sheet of Fulton Trouser Company, Inc., as at February 28, 1954, and a statement of income, profit and loss for January 1, 1954, to February 28, 1954, which did not set forth a true statement of its assets, liabilities, financial structure and condition, well knowing said writings and documents were false, fictitious and fraudulent (R. Vol. I, p. 3).

The second count, after adopting the preliminary allegations of count one by reference, charged that on or about April 28, 1954, defendants for the purpose of having the "corporations" designated as Small Business Concerns by Small Business Administration, had made and used a letter dated April 28, 1954, quoted therein in its entirety, addressed to the Regional Director, Small Business Administration, Atlanta, which omitting formal parts stated (R. Vol. I, pp. 4-5):

> "The Henry Garment Company, located at 166 Garnett Street and Fulton Trouser Company, located at 225 Central Avenue are affiliated companies. The Henry Garment Company has an average number of employees of 103. Fulton Trouser Company has an average number of 375 employees.
>
> "The Henry Garment Company and the Fulton Trouser Company have no connection whatsoever with Will Manufacturing Company, Atlanta, Georgia, and Federal Sportswear, Atlanta, Georgia.
>
> "This is to certify that there is no financial or organizational connection between the two companies, Henry Garment Company and Fulton Trouser Company, Inc., and the two companies, Will Manufacturing Company and Federal Sport-wear."

the defendants well knowing said letter was false, fictitious, and fraudulent in that the said "corporations" were in fact affiliated with each other, had financial and organizational connections with each other, and were not small business concerns as established by law, rules and regulations of the Small Business Administration, as defendants well knew.

A timely motion to dismiss count two was filed (R. Vol. I, pp. 7-9) upon grounds averring substantially

(a) No offense against the laws of the United States was alleged;

(b) The letter set forth therein, even if made and used as alleged and if false, fictitious and fraudulent as alleged, does not fall within the ambit of Section 1001, Title 18, United States Code, nor proscribed thereby;

(c) The designation of the named corporations as small business concerns by Small Business Administration is not the exercise of jurisdiction contemplated by Section 1001, Title 18, United States Code, so as to make the writing therein set out material within the purview of said statute;

(d) Small Business Administration is not an agency of the United States within the definition of Section 1001, Title 18, United States Code, and its functions and operations are not protected thereby; and

(e) The making and use of the writing therein set forth in the manner and form alleged does not constitute an offense against nor violation of Section 1001, Title 18, United States Code.

This motion was denied by the District Court, its opinion being set out hereto as Appendix I.

The case thereafter proceeded to trial, defendants were found guilty on each count, and petitioner was committed to the custody of the Attorney General for a period of two

years on each count, said sentences to be served concurrently (R. Vol. II, pp. 405-407).

With respect to count two of the indictment the issue here presented is framed by the language of the count, the motion to dismiss, and the statutes hereinbefore cited. With respect to count one of the indictment, however, the issue here presented is framed by the evidence introduced by the Government which may be briefly summarized.

Fulton Trouser Company, one of the corporations hereinbefore referred to, submitted a bid to Air Material Command, United States Air Force, for the production of certain garments and, in connection therewith, submitted a financial statement as alleged in count one of the indictment. The purpose of this statement, as expressly testified to by the witnesses for the Government, was to determine capability to produce the goods so ordered by the Government. An agent of the Federal Bureau of Investigation, several years subsequent to the submission of the financial statement, undertook an analysis of the statement from the books and records of Fulton Trouser Company and made certain adjustments therein. The adjusted statement is hereto appended as Appendix III.

It appeared without substantial dispute from the evidence that the goods themselves, contemplated by the contract awarded to Fulton Trouser Company, were produced, delivered, accepted and paid for by the United States of America. Likewise, the statement itself with the adjustments made thereon by the agent of the Federal Bureau of Investigation, petitioner contends, showed financial capability to perform the contract and, in fact, reflected that the company actually operated at a profit for the period covered by the financial statement, although the amount of this profit was determined by the FBI agent to be less than that reflected by the statement so submitted to the United States Air Force.

## REASONS FOR GRANTING THE WRIT.

The opinion entered by the Fifth Circuit Court of Appeals fails to clearly distinguish its holding as to count one of the indictment from its holding as to count two of the indictment but, on the other hand, tended to consider and dispose of the issues as to each of said counts collectively with the result that the questions presented hereby were dealt with on a composite basis.

### I.

So much of the decision of the Fifth Circuit Court of Appeals as held that the indictment was not subject to the attack made upon count two of same by the motion to dismiss extended the omnibus fraud statute (**Title 18, Section 1001, United States Code**) to an agency not intended by Congress to be included thereunder, specific provision having been made in the Act creating the Small Business Administration for penalties to punish transgressions against it, i. e., **Section 633 (a), Section 638 (a), Section 645 (a), Title 15, United States Code.**

In so holding the Fifth Circuit Court of Appeals disregarded the decision of this Court in **United States v. McNinch,** 356 U. S. 595, 2 Law Edition 1061, wherein this Court held that a false statement in an application to the Federal Housing Administration for credit insurance is not actionable under the **False Claims Act** (31 U. S. C. 231) since such is not a claim against the Government. Likewise, the Fifth Circuit Court of Appeals disregarded its own decision in **United States v. Moore,** 5 Cir., 185 F. 2d 92, in which it considered Section 80, Title 18, United States Code, being the predecessor section to the present Section 1001, as well as the following:

> **United States ex rel. Starr v. Mulligan** (App. D. C.) 59 F. 2d 200, 202 (Application for Civil Service Examination):

**United States v. Stark** (D. C. Md.), 131 F. Supp. 190, and

**United States v. Levin** (D. C. Colo), 133 F. Supp. 88 (Interrogations by F. B. I. Agents);

**Terry v. United States**, 8 Cir., 131 F. 2d 40 (Federal Housing Administration Credit Applications);

**United States v. Borth**, 10 Cir., 266 F. 2d 521 (Application by Veteran for sickness benefits).

Petitioner submits that the exercise of jurisdiction contemplated by Section 1001, Title 18, United States Code, is fundamentally different from that contemplated by Section 641 (c), Title 15, United States Code. In **Carroll Vocational Institute v. United States**, 5 Cir., 211 F. 2d 539, 540, the Fifth Circuit Court of Appeals stated:

> "Jurisdiction means the right to say and the power to act: . . ."

The decision of the Fifth Circuit Court of Appeals completely ignores the foregoing holdings and concepts.

## II.

In permitting the judgment to stand as to count one of the indictment, the Fifth Circuit Court of Appeals rendered a decision which is in conflict with the decision of the Court of Appeals of the District of Columbia in **Freidus v. United States** (App. D. C.), 223 F. 2d 598, which actually constituted a physical precedent for the case at bar, its facts bearing striking similarity to the evidence offered by the Government against petitioner. The court there emphasized the following matters:

> "We think, however, that this highly penal statute must be construed as requiring a materia' falsification.
>
> * * * * * * *
>
> "The financial statement submitted was materially false only if it misrepresented Starrett's ability to

repay a loan by misstating profitability, assets, or liabilities."

The ultimate issue here involved was not ability to repay a loan as none such was sought or granted. The concern was only ability to produce goods to fulfill a Government contract. The goods so ordered having been produced, delivered, accepted and, as the evidence in the instant case indicated, actually overrun and such additional goods so accepted and paid for, the false representations, if any, contained in the financial statement were conclusively demonstrated to be not material within the purview of Section 1001, Title 18, United States Code.

The language of the Court of Appeals of the District of Columbia in the **Freidus Case** (p. 601), demonstrates the lack of such materiality:

> "As the Government says, appellant sought 'to arrive at a financial statement more palatable to creditors.' But that purpose in no way reduces the Government's burden under the false statement statute; it must still prove that the specified entries were objectively false, and were made, wilfully and with knowledge of falsity, in a material matter within the jurisdiction of a department or agency of the United States."

The decision of the Fifth Circuit Court of Appeals herein likewise conflicts with the decision of the Court of Appeals of the District of Columbia in **Weinstock v. United States** (App. D. C.), 231 F. 2d 669, pointing up "materiality" in the following language:

> "'Material' when used in respect to evidence is often confused with 'relevant', but the two terms have wholly different meanings. To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i. e., reasonably likely to influence

the tribunal in making a determination required to be made. A statement may be relevant but not material.

* * * * * * *

"Materiality must be judged by the facts and circumstances in the particular case. The color of an accused's hair may be totally immaterial in one case, but in other circumstances the color of his hair may be not only material but decisively so."

No pretense was made by the Government that the financial statement was sought or desired for any purpose other than demonstrating the Fulton Trouser Company could produce goods to fulfill a Government contract. Any thesis that it could not do so was entirely disproved by the production, delivery, and acceptance of the goods ordered. So far as the statement itself was concerned, despite any criticism made of it by the agent of the Federal Bureau of Investigation who undertook to make adjustments therein, profits for the period in question were fixed at $17,077.10, or only $3,233.15 less than that shown on the statement submitted, to wit: $20,310.25. The statement as submitted, and the statement as adjusted, showed a deficit of $14,206.30.

This Honorable Court has never considered, determined, and promulgated standards governing "materiality" as this word is used in the Fraud Statute (Title 18, Section 1001, U. S. C.), and there is here presented a clear opportunity for a yardstick to be furnished by which prosecutors and defense counsel may be guided in the future. Petitioner submits this is particularly important in view of the fact that the Department of Justice shows a clear preference to prosecute under Section 1001 rather than under the specific penalty statutes spelled out by Congress in establishing Small Business Administration and wherein lighter sanctions were imposed.

## III.

The decision entered by the Fifth Circuit Court of Appeals in the instant case failed to take notice of and rule upon all of the assignments of error made therein. These assignments of error presented

(a) Sufficiency of the evidence to support a verdict of guilty on count two of the indictment, same having been preserved by motion for judgment of acquittal made at the conclusion of all of the evidence and thereafter by motion for judgment of acquittal notwithstanding the verdict;

(b) Permitting a special agent, Internal Revenue Service, to testify over objection that Fulton Trouser Company owed $34,872.74 in FICA and Withholding Taxes as of February 28, 1954, the date of the financial statement which formed the basis of the prosecution on count one, and thereby on objection by the Government squelching the effort of petitioner's counsel to establish that these taxes were subsequently paid; and

(c) Admitting into evidence certain documents which had been submitted by Fulton Trouser Company to Jones and Company on November 16, 1953, which documents certified that as of that date all of the stock of Will Manufacturing Company and Federal Sportswear, Inc., was owned by petitioner, Leonard J. Sachs, over objections that these documents were never presented to nor acted on by any Government Agency; the date of same was at least six months antecedent to the representation made to Small Business Administration on April 28, 1954, complained of in count two of the indictment; and that if such documents were admissible in evidence at all, it would be only for the limited purpose of impeachment after petitioner had taken the stand and testified in the cause, which objections were overruled.

The omission of the Fifth Circuit Court of Appeals to notice and rule upon these assignments was timely called to its attention in the petition for rehearing in Ground III on page 5 thereof (R. Vol. II, p. 419). Petitioner submits this situation calls for the exercise of jurisdiction by this Court as in **Maryland Casualty Company v. Jones**, 279 U. S. 792, 796, wherein this Honorable Court stated:

> "Since on the face of the record the failure of the Circuit Court of Appeals to consider the assignments of error relating to rulings at the hearing is unexplained, and its action appears to have been erroneous, its judgment must be reversed."

Failure to notice and rule upon specific assignments of error squarely presented to a court for decision amounts to denial of right of appeal as to such issues and as stated in **Boykin v. Huff** (App. D. C.), 121 F. 2d 865, 872:

> "The right of appeal, though statutory, is not insubstantial, and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily."

Petitioner submits that he was entitled to have all of his assignments of error considered and determined as an integral part of the disposition of his appeal.

## CONCLUSION

The ruling below extends the omnibus fraud statute (Section 1001, Title 18, U. S. C.) to an agency obviously not intended by Congress to be covered thereby, and ignores the fundamental concept of "materiality" so carefully spelled out by Congress in said statute. The decision is in conflict with decisions of the Court of Appeals for the District of Columbia herein cited. Likewise, errors of law committed by the Trial Judge during the course of

the proceedings were ignored and not passed upon. The petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

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## APPENDIX I.

### Opinion in District Court.

(Filed in Clerk's Office Aug. 26, 1958.)

In the United States District Court,
Northern District of Georgia,
Atlanta Division.

| | |
|---|---|
| United States of America<br>v.<br>Leonard J. Sachs and<br>William Sachs. | No. 21,576<br>Criminal |

In brief, it is alleged, in Count One of the indictment in the above stated case, that at all times pertinent that the defendant Leonard J. Sachs was President and a Director of Fulton Trouser Company, Inc., and Henry Garment Company, and that the defendant, William Sachs, was Secretary-Treasurer and a Director of Fulton Trouser Company, Inc., and Henry Garment Company, both concerns being alleged to be corporations organized under the laws of the State of Georgia; that at all times pertinent the Small Business Administration was an independent agency of the United States of America and that the Air Material Command was an agency of the United States Air Force; that on or about the 27th day of March, 1954, the defendants, in a matter within the jurisdiction of the United States Air Force did, for the purpose of obtaining a contract from said Air Material Command, United States Air Force, knowingly and willfully make and use, and willfully cause to be made and used, material false writings and documents, knowing the same to contain false, fictitious and fraudulent statements and entries, to-wit: a Balance Sheet of Fulton Trouser Company, Inc., as at

February 28, 1954, and a Statement of Income, Profit and Loss, January 1, 1954, to February 28, 1954, well knowing that the same were false, fictitious and fraudulent in that same did not set forth a true statement of the assets, liabilities, financial structure and condition of said corporations, in violation of §§ 2 and 1001, Title 18, U. S. C.

Count Two charges that on or about April 18, 1954, the defendants, in a matter within the jurisdiction of the Small Business Administration, an agency of the United States, did, for the purpose of having the above named corporations designated by the Small Business Administration as small business concerns, knowingly and willfully make and use, and willfully cause to be made and used, a material false writing and document, knowing the same to contain certain false, fictitious and fraudulent statements, to-wit: a certain letter (the letter being set out in hac verba in the indictment and being verified by the affidavit of William Sachs), dated April 28, 1954, to the Small Business Administration in which it was stated, inter alia, that the Henry Garment Company and Fulton Trouser Company were affiliated companies with 103 and 375 employees, respectively; that these two companies had no connection whatever with Will Manufacturing Company and Federal Sportswear and that there was no financial or organizational connection between Henry Garment Company and Fulton Trouser Company, Inc., and the two companies, Will Manufacturing Company and Federal Sportswear, the defendants well knowing that such writing and document was false, fictitious and fraudulent in that said corporations were affiliated with each other, did have financial and organizational connections and operation with each other and that the said corporations were not small business concerns as established by law and the rules and regulations of the Small Business Administration, as defendants then and there well knew, in violation of §§ 2 and 1001, Title 18, U. S. C.

The defendants move to dismiss Count Two of the indictment upon the following grounds:

1. No offense against the laws of the United States is alleged against defendants or either of them therein.

2. That the letter set forth, even if made and used as alleged, and if false, fictitious and fraudulent as alleged, does not fall within the ambit of § 1001, Title 18, U. S. C.

3. The designation of the named corporations as small business concerns by the Small Business Administration is not within the exercise of jurisdiction contemplated by § 1001, Title 18, U. S. C., so as to make the writing set out material within the purview of the statute.

4. The Small Business Administration is not an agency of the United States within the definition of § 1001, Title 18, U. S. C., and its functions and operations are not protected thereby.

5. The making and use of the writing set forth in the manner and form alleged does not constitute an offense against, nor violation of § 1001, Title 18, U. S. C.

In the alternative, defendants move to strike the following language from Count Two:

". . . that the said 'corporations' were not small business concerns, as established by law, rules and regulations of the Small Business Administration, as the defendants then and there well knew";

on the ground that the same is surplusage, inflammatory and prejudicial to defendants because:

1. The alleged false writing contains no statement or representation that the corporations were "small

business concerns, as contemplated by law, rules and regulations of the Small Business Administration;"

2. Having such corporations designated by the Small Business Administration as small business concerns knowing they were not such "as established by law", etc., is not proscribed by § 1001, Title 18, U. S. C. and is not an offense thereunder; and

3. Permitting such language to remain in the indictment would be inflammatory and tend to create bias and prejudice against defendants in the eyes of a jury upon the trial thereof.

Further, in the alternative, defendants move for an order directing that the United States serve and file a bill of particulars containing the following information:

1. As to the Balance Sheet referred to in Count One:

(a) The respects in which the statement of assets were not true.

(b) The respects in which the statement of liabilities were not true.

(c) The items and figures contained therein which are charged to be false and fictitious.

2. As to the Statement of Income, Profit and Loss referred to in Count One, the information requested in Paragraph 1 (a), (b) and (c) above.

3. As to Count Two of the Indictment:

(a) The nature of and manner in which the corporations "were in fact affiliated with each other";

(b) The nature and kind of "financial and organizational connections and operations" said corporations had "with each other," and

(c) Wherein such corporations were not "small business concerns, as established by law, rules and regulations of the Small Business Administration."

Defendants' motions are now before the Court for determination under the Local Rules of this Court.

That the prosecution here is under the general Fraud Statute [18 U. S. C., § 1001] when the acts alleged are specifically proscribed by Title 15, U. S. C., § 638 (a), which provides lighter sanctions, furnishes no grounds for dismissal of the indictment. Ehrlich v. United States, 5 Cir., 238 F. 2d 481, 485.

The motion to dismiss Count Two of the indictment is overruled and denied.

The allegations of Count Two of the indictment which defendants move to strike as surplusage under Rule 7 (d), Federal Rules of Criminal Procedure, are relevant to the charge contained in that count of the indictment and are not subject to be stricken as surplusage. United States v. Klein (D. C. N. Y.), 124 F. Supp. 476.

The motion to strike is overruled and denied.

The information sought by the motion for a bill of particulars, or the means of ascertaining same, appears to be in possession of, or available to the defendants.

The indictment is sufficiently definite to advise the defendants of the specific acts with which they are accused.

The motion for a bill of particulars is overruled and denied.

This the 26th day of August, 1958.

Boyd Sloan,
United States District Judge.

## APPENDIX II.

### Opinion in Court of Appeals.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

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No. 18575.

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Leonard J. Sachs,

Appellant,

versus

United States of America,

Appellee.

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Appeal from the United States District Court for the Northern District of Georgia.

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(August 24, 1961)

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Before Hutcheson, Rives and Wisdom, Circuit Judges.

Hutcheson, Circuit Judge: The appellant, along with one William Sachs, who is not a party to this appeal, was indicted in two counts for violation of 18 U. S. C. Sec. 1001, for making and presenting to the United States Air Force and the Small Business Administration certain false and fraudulent documents and statements. Urging that the evidence was insufficient to support the conviction, Sachs points to the fact that, while the statements and documents were furnished with his authority and some of them under his own hand, there is no direct evidence that he knew their contents were fraudulent, and, therefore, the evidence is insufficient to support the conviction.

The United States, pointing to the fact that the defendant-appellant controlled the four corporations involved, The Fulton Trouser Company, Federal Sportswear, Inc., Will Manufacturing Company, and Henry Garment Company, that the books of all of them were kept at 225 Central Avenue, Atlanta, Georgia, where the headquarters of Fulton Trouser Company were located; and that, by letter dated March 27, 1954, signed by Sachs as President, the balance sheet, in question, of Fulton as of February 28, 1954, and a statement of income, profit and loss for the period January 1, to February 28, 1954, were transmitted to the United States Air Force in connection with the procurement of a certain contract by Fulton for the manufacture of flying suits for the Air Force; insists that the circumstances in evidence are sufficient to support the finding of the jury, that Sachs was responsible for the issuance and use of the statements, and that he knew the falsity of their contents.

We agree with the United States that the fact that the figures were not actually prepared by the defendant but by Mr. Gertz, the company accountant, is not sufficient to support Sachs' claim that the proof failed to convict him of the offenses charged. One Omie Dixon, employed by Sachs as general clerk or secretary of Fulton in 1948 and with him from that time through 1954, was in 1953-54 in charge of the office, her duties having increased. She was in charge of the staff employees in the office and had charge of the books of the four corporations, all of which were controlled by the appellant. It was Omie Dixon who prepared the March 27, 1954 letter signed by Leonard Sachs, along with the balance sheet and statement of income attached thereto. She prepared them under the direction of Leonard Sachs, who gave her a pencilled copy from which to prepare the statements. The pencilled copies of the balance sheet and statement of income, profit and loss were made up by Leonard Sachs from information

obtained over the telephone from Mr. Irwin Gertz, G. A. Remillard, Special Agent with the Internal Revenue Service, testified: that he had occasion to contact the appellant Sachs in connection with the affairs of Fulton; that he took a statement under oath from Sachs and also questioned him about the affairs of Federal, Will, and Henry; and that Sachs stated to him that he controlled and formulated all the policies of the four corporations.

The appellant also stated to Remillard that the work performed by the accountant firm of Guttelman and Co. was auditing the books; and that this firm would come to Atlanta and audit the books; and further stated: "I guess that is about all they would do".

With the testimony standing thus and the falsity of the statements quite plain, we think it clear that the evidence was ample to support the jury's finding, that Sachs was responsible for the issuance of the statements, that he knew their contents and knew that the statements were false.

In addition to his attack upon the insufficiency of the evidence, the appellant assigns error to the overruling of appellant's motion to dismiss count two of the indictment and, in the alternative, to strike, surplusage therefrom and, further in the alternative, for a bill of particulars.

As to these claims of error, we think it plain that the indictments were not subject to the attacks upon them and that there is no sound basis for the claim that it was error to deny the motion for a bill of particulars. It was well within the discretion of the court to grant or deny it.

In addition to these assignments, appellant argues strongly that it was error for the court to refuse to give plaintiff's requested instructions Nos. 4 and 5, which in effect instructed the jury as to the effect which must be given to the acts of those in charge of Georgia corporations

The charges were properly refused, the evidence was all before the jury, and the judge's general charge correctly submitted to the jury the issues for their determination. The refusal of the charges of which appellant complains was not error. On the contrary, it would have been error to give them because, instead of leaving to the jury the determination of the facts under general instructions, it would have had the effect of controlling and directing the jury's consideration of the evidence. The matters in question had to do with corporate acts, the responsibility under the evidence of the defendant therefor, and under the evidence, which was sufficient to convict, this was for the jury's determination.

No reversible error appearing, the judgment is

Affirmed.

A true copy

Test:

Edward W. Wadsworth, Clerk,
U. S. Court of Appeals,
Fifth Circuit.

By Gilbert F. Gannebean,
Deputy.

(Seal)

New Orleans, Louisiana
Oct. 2, 1961

**Judgment.**

Extract from the Minutes of August 24, 1961.

Leonard J. Sachs,

No. 18573 versus

United States of America.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel:

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

In the United States Court of Appeals
For the Fifth Circuit.

---

No. 18575.

---

Leonard J. Sachs,
Appellant,

vs.

United States of America,
Appellee.

---

Appeal from the United States District Court for the Northern District of Georgia.

---

(September 22, 1961.)

**On Petition for Rehearing.**

---

Before Hutcheson, Rives and Wisdom, Circuit Judges.

Per Curiam:

It is Ordered that the petition for rehearing in the above entitled and numbered cause be, and it is hereby Denied.

# APPENDIX III

## Analysis of Balance Sheet Items of Fulton Trouser Company as of February 28, 1954.

| ASSETS | Balance Sheet 2-28-54 | Audit's Balance Sheet Items | Differences |
|---|---|---|---|
| [illegible] | $ 16,837.94 | $121,121.96 | $ 11,279.00 |
| [illegible] Receivable | 96,119.97 | 16,476.24 | $ 3,643.73 |
| [illegible] | 91,603.88 | 91,603.88 | |
| [illegible] Receivable—Employees | 9,853.31 | 9,853.31 | |
| [illegible] & Fixtures—Auto & Trucks—Net | 147,007.67 | 147,007.67 | |
| [illegible]ance—Officer | 2,187.50 | 2,187.50 | |
| [illegible]ance—Unexpired | 12,729.22 | 12,729.22 | |
| [illegible] | 3,865.20 | 3,865.20 | |
| [illegible]old Improvements—Unamortized | 15,899.74 | 15,899.74 | |
| Total Assets | $396,104.53 | $269,201.80 | $126,902.73 |
| LIABILITIES, CAPITAL & SURPLUS | | | |
| [illegible]nts Payable | $ 70,478.28 | $ 62,222.52 | $ 8,255.76 |
| [illegible]ed Expenses | 98,902.80 | 98,703.67 | $ 199.13 |
| [illegible] & Company—Mortgage | 48,609.52 | 48,609.52 | |
| [illegible]—Ginsberg Machine Co. | 18,923.02 | 18,923.02 | |
| [illegible] Payable | 26,153.12 | 26,153.12 | |
| [illegible]nts Payable—Henry Garment Co. | 25,270.49 | | 25,270.49 |
| [illegible]nts Payable—Federal Sportswear, Inc. | 16,043.35 | | 16,043.35 |
| [illegible] Security Taxes | | 3,147.28 | ( 3,147.28) |
| [illegible]employment Insurance | | 3.97 | ( 3.97) |
| [illegible]holding Taxes | | 32,946.20 | (32,946.20) |
| Total Liabilities | $304,400.58 | $290,731.00 | $ 13,669.58 |
| [illegible]ital and Surplus: | | | |
| [illegible]ital Stock—50 Shares No Par Common | $ 35,600.00 | $ 25,600.00 | |
| Capital Stock—Preferred | 40,000.00 | | $ 50,000.00 |
| [illegible]ned Surplus—Deficit | (14,206.30) | (14,206.30) | |
| [illegible]ts for Period | 30,310.25 | 17,077.10 | 13,233.15 |
| Total Capital & Surplus | $ 91,703.95 | $ 28,470.80 | $ 63,233.15 |
| Total Liabilities, Capital & Surplus | $396,104.53 | $269,201.80 | $126,902.73 |

# Analysis of Income & Expense Items of Fulton Trouser Company as of February 28, 1954.

| | Statement of Income P & L | Per Analysis Income Expense |
|---|---|---|
| Sales | $238,189.53 | $224,514.20 |
| **Cost of Goods Sold:** | | |
| Inventory 1-1-54 | $ 84,635.92 | $ 84,635.92 |
| Purchases—Net | 49,082.56 | 49,082.56 |
| Payroll | 133,777.15 | 133,777.15 |
| Payroll Taxes | 6,918.90 | 6,918.90 |
| Totals | $265,414.43 | $274,414.53 |
| Less Inventory 2-28-54 | 91,603.88 | 91,603.88 |
| Cost of Goods Sold | $173,810.55 | $182,810.65 |
| Gross Profit | $ 64,378.98 | $ 41,703.55 |
| General & Administrative Expenses | $ 6,300.00 | $ 6,300.00 |
| Rent | 3,850.00 | 3,850.00 |
| Machine Repairs | 537.64 | 537.64 |
| Interest | 531.58 | 531.58 |
| Taxes—General | 67.50 | 67.50 |
| Charity | 10.00 | 10.00 |
| Depreciation | 3,470.79 | 3,470.79 |
| Advertising | 169.91 | 169.91 |
| Trucking | 484.12 | 484.12 |
| Machine Parts & Supplies | 8,011.80 | 8,011.80 |
| Factory Supplies & Expenses | 2,795.14 | 2,795.14 |
| Light, Heat & Power | 1,916.36 | 1,916.36 |
| Legal & Audit | 2,000.00 | 2,000.00 |
| Travel & Entertaining | 3,817.63 | 3,817.63 |
| Telephone | 1,472.44 | 1,472.44 |
| Office Supplies | 1,175.61 | 1,175.61 |
| General Expenses | 991.41 | 991.41 |
| Factors Charges | 849.05 | 1,849.05 |
| Insurance | 1,610.45 | 1,610.45 |
| Bank Charges | 172.61 | 172.61 |
| Auto Expenses | 214.69 | 214.69 |
| Machine Rent | 936.04 | 936.04 |
| Dues & Subscriptions | 274.69 | 274.69 |
| Amortization of Leasehold | 3,179.95 | 3,179.95 |
| Total Expenses | $ 44,068.73 | $ 47,068.73 |
| Profit or Loss | $ 20,310.25 | $ (5,310.25) |
| **Miscellaneous Income:** | | |
| Rent Charged to Henry Garment Co. | | $ 6,000.00 |
| Charges to Will Manufacturing Co. and Federal Sportswear for Factors Charges | | 1,849.05 |
| Charges to Will Manufacturing Co. and Federal Sportswear for Cutting and for Office Expenses | | 12,000.00 |
| Total Miscellaneous Income | | $ 19,849.05 |
| Profit for Period | $ 20,310.25 | $ 14,538.80 |

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619908—61

# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 510

LEONARD J. SACHS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (R. 414–417; Pet. Appendix II) is reported at 293 F. 2d 623. The opinion of the district court (R. 10–15; Pet. Appendix I) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on August 24, 1961 (R. 418; Pet. App. 23–24). A petition for rehearing (R. 419–427) was denied on September 22, 1961 (R. 428; Pet. App. 24). The petition for a writ of certiorari was filed on October 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether false statements made in a financial report submitted to the United States Air Force to show capacity to perform a procurement contract were material although the contract was in fact satisfactorily performed.

2. Whether the court of appeals failed to pass upon all of petitioner's assignments of error.

3. Whether an indictment for making a false statement to the Small Business Administration should have been dismissed because brought under 18 U.S.C. 1001 rather than 15 U.S.C. 645(a).

## STATUTES INVOLVED

Section 1001 of Title 18 U.S.C. provides:

> *Statements or entries generally.*—Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 2 of Title 18 U.S.C. provides:

*Principals.—*

> (a) Whoever commits an offense against the United States or aids, abets, counsels, induces or procures its commission, is punishable as a principal.

> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Former 15 U.S.C. 638(a), Section 209(a) of the Act of July 30, 1953, 67 Stat. 237 [now 15 U.S.C. 645(a)] provided as follows:

> (a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of obtaining for himself or for any applicant any loan, or extension thereof by renewal, deferment of action, or otherwise, or the acceptance, release, or substitution of security therefor, or for the purpose of influencing in any way the action of the Administration, or for the purpose of obtaining money, property, or anything of value, under this chapter, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

## STATEMENT

Petitioner Leonard J. Sachs and William Sachs (not presently involved), the president and secretary-treasurer, respectively, of Fulton Trouser Company, Inc., were charged in count 1 of an indictment returned in the United States District Court for the Northern District of Georgia, with knowingly and willfully making a false balance sheet and statement of income, profit, and loss for Fulton on March 27, 1954, in a matter within the jurisdiction of the United States Air Force for the purpose of obtaining a clothing contract from the Air Force (R. 2–3). Count

2 charged these defendants with making willful misstatements in a matter within the jurisdiction of the Small Business Administration by a letter dated April 28, 1954, for the purpose of having certain corporations designated as small business concerns (R. 3–5). The acts are alleged to be in violation of 18 U.S.C. 2 and 1001. Prior to trial a defense motion to dismiss count 2, on the ground *inter alia* that it did not state an offense under 18 U.S.C. 1001 (R. 5–9), was overruled by the district court (R. 10–15). The jury found the defendants guilty on both counts (R. 395). Petitioner was sentenced to imprisonment for two years on count 1, and two years on count 2 to run concurrently with the sentence on count 1 (R. 406–408). On appeal (R. 408) the conviction was affirmed (R. 418; Pet. App. 23–24).

Pertinent evidence adduced at the trial may be summarized as follows:

During the latter part of February 1954, one Young, a financial analyst for the Warner Robins Air Materiel Area at Robins Air Force Base, Georgia, was conducting an investigation to determine the financial capacity of the Fulton Trouser Company to perform an Air Force contract (R. 29-30). Young and Lt. Schneider, an Air Force accountant, went to Fulton's place of business where they talked with William Sachs and others, and telephoned Fulton's accountant, Gertz. They emphasized the urgency of obtaining a late financial statement (R. 33–35, 80–82), and the Fulton representatives promised to furnish one accurate as of Feb-

ru. ry 28, 1954, and thus more current than the preceding one of December 31, 1953 (R. 45, 77). It was indicated that a cash position of $548.46 as of December 31, 1953, would be replaced by a $16,000 figure as of February 28, 1954 (R. 46), and that the new statement would show $50,000 paid to the corporation in exchange for preferred stock since December 31, 1953 (R. 46–47, 78). At a later meeting the petitioner told Young that the $50,000 in exchange for preferred stock had been paid in (R. 37) and that the cash position had improved to $16,000 (R. 48).

A letter dated March 27, 1954, to Warner Robins Air Materiel Area, signed by petitioner as president of Fulton, with an attached balance sheet as of February 28, 1954, and a statement of Fulton's income, profit, and loss, from January 1, 1954, to February 28, 1954, was introduced in evidence as Gov. Ex. 7 as the basis for count 1 of the indictment (R. 26, 38). The letter and statements had been prepared under the direction of petitioner, who had given his secretary a penciled copy from which to prepare the statements (R. 105–106). An F.B.I. accountant, in the examination of Fulton's books, found that instead of having $16,837.94 cash on hand as shown on Gov. Ex. 7, Fulton was overdrawn in the amount of $24,421.06 (R. 287); that the accounts receivable item of $96,119.97 was not correct, but as of February 28, 1954, amounted to $10,476.24 (R. 288–289); that Fulton's books showed withholding taxes of $32,946.20 owing as of February 28, 1954, but this item did not appear on the balance sheet (R. 297–298); that although

there was a journal entry in Fulton's books concerning the issuance of $50,000 of preferred stock in March 1954, there was no entry reflecting the payment to Fulton of $50,000 (R. 300–301); and that an analysis comparing the financial statement and the company's books showed a difference in net profit of $3,233.15 (R. 309). The financial analyst, Young, testified that if he had known the true situation as to the debt for withholding taxes, the overdrawn cash position, and the $50,000 preferred stock, he would not have been able to approve the contract (R. 49, 51–54). The $296,320 contract involved (Gov. Ex. 15) was awarded to Fulton on April 30, 1954 (R. 195) and was performed satisfactorily (R. 150, 190–194, 358–359).

As to count 2, there was introduced in evidence Gov. Ex. 9, a letter dated April 28, 1954, signed by William Sachs as secretary-treasurer of the Henry Garment Company, and prepared by the petitioner's secretary under petitioner's direction (R. 4–5, 105–109). The letter, a response to a request for information by the Small Business Administration, stated that the Henry Garment Company and the Fulton Trouser Company were affiliated companies with 103 and 375 employees, respectively, but that these companies had no financial or organizational connection with Will Manufacturing Company and Federal Sportswear (R. 4–5, 245, 250–252). Under the Small Business Administration regulations[1] if different companies were affiliated and had more than 500

[1] See 13 C.F.R. § 121.3—1, 2 and 3.

employees they would not be considered eligible for small business government contracts (R. 246–248, 259–260). There was evidence that petitioner controlled all four companies and all had their books at the same location and used the same garment cutting room (R. 98–103, 140–143, 145–146, 174). The total number of employees of the four companies was approximately 800 during the period in question (R. 312–315, 319). If the letter had shown that the four companies were affiliated and had more than 500 employees, the Small Business Administration representative would have given a negative report (R. 262).

The court charged the jury as a matter of law that the United States Air Force, Air Materiel Command, was an agency or department of the United States within the meaning of 18 U.S.C. 1001; that the Small Business Administration was a department or agency of the United States within that section; and that the two letter exhibits (Gov. Ex. 7 as to count 1 and Gov. Ex. 9 as to count 2) constituted statements of material facts within that statute (R. 379–381). The court charged that whether the United States lost, or did not lose, as a result of the award of the contract, was immaterial, except for whatever light it might shed on the question of the intent of the defendants and the question of the falsity of the documents (R. 381). The jury was further charged regarding small businesses and affiliation and common control or ownership (R. 382–383).

ARGUMENT

1. Petitioner asserts that, since the goods were satisfactorily produced under the contract, the false representations in the financial statement to the Air Force could not be material within the purview of 18 U.S.C. 1001 (Pet. 9–11). The fact that the government suffered no pecuniary or property loss as a result of the false statements does not, however, show that they were not material. *United States* v. *Gilliland*, 312 U.S. 86, 93.

The test as to materiality of a false statement is whether it has a natural tendency to influence, or is capable of influencing, the officials to whom it is presented in making a determination approving the contract. *Weinstock* v. *United States*, 231 F. 2d 699, 701, 702 (C.A.D.C.); *Gonzales* v. *United States*, 286 F. 2d 118, 122 (C.A. 10), certiorari denied, 365 U.S. 878. Here the false statements had more than a mere tendency to influence; they actually did mislead the government officials into approving the contract. If the officials had known of the excessive amount of unpaid withholding taxes, of the grossly misstated cash position, and of the true situation as to the $50,000 in preferred stock, they would not have approved execution of the contract. In these circumstances it is clear that the false statements in the financial report were material, as the district court found.

Petitioner's reliance upon *Freidus* v. *United States*, 223 F. 2d 598 (C.A. D.C.) and *Weinstock* v. *United States*, 231 F. 2d 699 (C.A. D.C.), is misplaced. In

*Freidus* the financial statement submitted was not sufficiently current and thus was never considered by the RFC. There was no actual possibility that the agency would be influenced by, or induced to act upon, the alleged false statements contained therein. In *Weinstock* the alleged false statement was considered not material because, unlike the situation here, the statement was just one part of a very lengthy affidavit and thus was without weight or influence in any decision to be made by the Subversive Activities Control Board.

2. Petitioner complains that in deciding the appeal the court of appeals ignored three of his assignments of error (Pet. 12–13). In the last paragraph the opinion states, "No reversible error appearing, the judgment is Affirmed" (Pet. App. 23). Implicit in this statement is a considered rejection of petitioner's assignments of error even though not expressly spelled out. The court of appeals could properly feel that the claims did not merit discussion.

a. The sufficiency of the evidence to support a conviction on count 2 of the indictment is clearly established by the summary of evidence bearing on this count in the Statement, *supra*, pp. 6–7.

b. There was no error in permitting testimony by Internal Revenue Service agent Remillard that Fulton owed $34,872.74 in FICA and withholding taxes as of February 28, 1954, the date of the financial statement involved in count 1. This evidence came in over objection on direct examination of the agent as part of the government's case (R. 146–148, 151–

153). On cross-examination petitioner's counsel asked what portion of these taxes had been paid, but objection to this question was sustained as not being material (R. 153–154). The agent was then asked whether the taxes were paid on or before March 27, 1954, and he replied that he did not know (R. 154-155).

This testimony as to the unpaid taxes was relevant and admissible since they were not entered on the financial statement as one of Fulton's liabilities. The statement was false as of February 28, 1954, and it was immaterial whether the taxes were paid at some later date. Long before objection to agent Remillard's testimony, moreover, government evidence as to these taxes had come in without objection (R. 49, 53, 54) and defense counsel had even mentioned them in cross-examination of government witnesses (R. 64, 91).

c. Finally there was no error in admitting in evidence Gov. Exs. 10, 11, 12 and 13 over objection (R. 112–117, 119–123). In each of these affidavits dated November 16, 1953, executed in connection with a guaranty of Fulton to Jones & Company, petitioner stated that he owned 100% of the shares of stock in the four corporations, Fulton, Federal, Will, and Henry. The court carefully pointed out to the jury, in response to petitioner's objection, that these documents had not been submitted to the Small Business Administration. It further instructed that they were submitted only for whatever light they might shed on the issue of the truth or falsity of Gov. Ex. 9, the

letter of April 28, 1954, to the Small Business Administration—a matter as to which they were relevant and material (R. 122–123). Finally, as to defense counsel's objection that these documents were earlier than petitioner's letter to the Administration, the court offered to hear evidence that the documents were obsolete by reason of later stock transfers, but counsel admitted that he had no evidence of a formal stock transfer by petitioner (R. 114, 116–117).

3. Petitioner also raises a question of the validity of the indictment and sufficiency of the evidence on count 2. He argues that he could not be prosecuted on count 2 under the general false statement statute, 18 U.S.C. 1001 (*supra*, p. 2), but only under 15 U.S.C. 638(a), now 15 U.S.C. 645(a) (*supra*, p. 3), specifically covering false statements to the Small Business Administration (Pet. 8–9). These issues need not be reached since the sentence on count 2 is concurrent with that on count 1. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339, 359. Moreover the sentence imposed on count 2 is within the maximum that could have been imposed if the prosecution had been brought under 15 U.S.C. 645(a). There is no difference in the elements of the offense under the statutes except possibly a heavier burden on the government under 18 U.S.C. 1001 since that statute contains more exacting language, "knowingly and willfully," whereas 15 U.S.C. 645(a) speaks merely of making a statement "knowing" it to be false. Hence petitioner cannot claim prejudice even if the wrong statute were cited.

In any event there is nothing in the Small Business Administration statute to indicate that Congress intended a pro tanto repeal of the general fraud statute to eliminate from the purview of the latter statute false statements made to that Administration. *United States* v. *Gilliland*, 312 U.S. 86, 95–96; *Ehrlich* v. *United States*, 238 F. 2d 481, 485 (C.A. 5); *United States* v. *Greenberg*, 268 F. 2d 120, 122 (C.A. 2); *United States* v. *Quirk*, 266 F. 2d 26 (C.A. 3); and see *Berra* v. *United States*, 351 U.S. 131.

## CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
*Solicitor General.*

HERBERT J. MILLER, JR.,
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BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
*Attorneys.*

NOVEMBER 1961.

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